

Rules of Department of Revenue

Division 10—Director of Revenue

Chapter 113—Sales/Use Tax—Use Tax

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Title 12—DEPARTMENT OF REVENUE

Division 10—Director of Revenue Chapter 113—Sales/Use Tax—Use Tax

12 CSR 10-113.200 Determining Whether a Transaction Is Subject to Sales Tax or Use Tax

PURPOSE: Chapter 144, RSMo, contains the statutory provisions governing application of sales and use tax. This rule explains how to determine whether a transaction is subject to sales tax or use tax. This rule also explains what transactions are exempt from sales tax under the interstate commerce exemption in section 144.030.1, RSMo.

(1) In general, a sale of tangible personal property is subject to sales tax if title to or ownership of the property transfers in Missouri unless the transaction is in commerce. The seller must collect and remit the sales tax. If a sale is not subject to Missouri sales tax but the property is stored, used or consumed in Missouri, the transaction is subject to use tax. If the transaction is subject to use tax and the seller has nexus with Missouri, the seller must collect the tax at the time of the sale and remit it to the department. If the seller does not collect the tax, the buyer must pay use tax directly to the department. If a sale of tangible personal property is not subject to Missouri sales tax and the property is not stored, used or consumed in this state, no Missouri tax is due. A sale of a taxable service is subject to sales tax if the service is performed in Missouri. If the service is not performed in Missouri, the sale is not subject to tax.

(2) Definition of Terms.

(A) Nexus—contact with the state sufficient under the *United States Constitution* to allow the state to exercise its power to tax.

(B) In commerce—a transaction is in commerce if the order is approved outside Missouri and the tangible personal property is shipped from outside Missouri directly to the buyer in Missouri.

(3) Basic Application of Taxes.

(A) Title transfers when the seller completes its obligations regarding physical delivery of the property, unless the seller and buyer expressly agree that title transfers at a different time. A recital by the seller and buyer regarding transfer of title is not the only evidence of when title passes. The key is the intent of the parties, as evidenced by all relevant facts, including custom or usage of trade.

(B) Unless otherwise agreed by the parties, when a Missouri seller delivers tangible personal property to a third-party common or contract carrier for delivery to an out-of-state location, title does not transfer in Missouri and the sale is not subject to Missouri sales tax. A buyer that carries its own goods is not acting as a common or contract carrier.

(C) When an out-of-state seller delivers tangible personal property to a third-party common or contract carrier for delivery to Missouri, title transfers in Missouri. If delivery is made to seller or an agent of seller (other than a third-party common or contract carrier) in Missouri and subsequently delivered to the buyer in Missouri, the sale is subject to Missouri sales tax. If delivery is made directly from the out-of-state seller to the buyer in Missouri, the sale is subject to sales tax if the order was approved in Missouri. If the order was approved outside Missouri, the sale is not subject to sales tax, but the transaction is subject to use tax unless otherwise exempt.

(D) Leases of tangible personal property generally follow the same taxing guidelines as sales of tangible personal property. Leases of tangible personal property by Missouri lessors are subject to sales tax if the lessee obtains possession in Missouri. Leases of tangible personal property by non-Missouri lessors are subject to Missouri sales tax if the tangible personal property is located in Missouri prior to entering the lease and the lessee obtains possession in Missouri. Leases of tangible personal property that are not subject to sales tax are subject to use tax if the lessee stores, uses or consumes the tangible personal property in Missouri.

(4) Examples.

(A) A seller accepts orders in Missouri. The seller fills orders from its warehouses located both within and without Missouri. A customer orders goods from the seller in Missouri. The order is filled from an out-of-state warehouse and shipped directly to the customer. The transactions are subject to sales tax because the order is accepted in Missouri.

(B) A customer purchases custom fabricated goods from a Missouri seller. The order for the goods must be approved at the seller's out-of-state headquarters. The goods will be shipped by the seller directly from the out-of-state facility to the customer's Missouri location. The sale is subject to use tax because the order was approved out-of-state and the goods were shipped from out-of-state directly to the customer in Missouri. The seller must collect and remit the use tax.

(C) A Missouri seller sells pens, calendars, cups and similar items with the customer's logo printed on them. The seller sends the orders to an out-of-state supplier to custom print the items that are drop shipped directly to the customer in Missouri. The sale is subject to sales tax because the customer's order taken by the seller is approved in Missouri.

(D) While visiting Missouri, an Illinois resident purchases a set of luggage at a Missouri department store. The buyer requests the seller to ship the luggage to an Illinois address. The sale is not subject to Missouri sales or use tax because title does not transfer in Missouri.

(E) An out-of-state customer purchases a kitchen table set from a Missouri seller. Under the terms of the sale, the seller is to ship the set to a Missouri location for storage until the customer is able to arrange to pick up the set with its truck or by third-party carrier. The sale is subject to sales tax.

(F) An Illinois construction contractor leases a backhoe from an Illinois lessor. Prior to entering the lease, the backhoe was located in Missouri. The contractor takes possession of the backhoe at the Missouri location. The lease is subject to sales tax.

(G) A seller has no place of business in Missouri. A sales representative who works from a non-Missouri location visits Missouri customers. All orders are accepted outside Missouri and goods are shipped to Missouri customers from outside the state. The seller must collect and remit use tax.

(H) A seller has a location in Missouri. A Missouri customer places an order directly with the seller's non-Missouri location via e-mail. The goods are shipped directly to the Missouri customer from the non-Missouri location. The Missouri office does not participate in the sale. The seller must collect and remit use tax.

AUTHORITY: sections 144.270 and 144.705, RSMo 2000.* Original rule filed Jan. 10, 2002, effective July 30, 2002.

*Original authority: 144.270, RSMo 1939, amended 1941, 1943, 1945, 1947, 1955, 1961; and 144.705, RSMo 1959.

Bratton Corp. v. Director of Revenue, 783 S.W.2d 891 (Mo. banc 1990). Goods delivered to a contractor in Missouri upon purchase from a Missouri vendor were not in commerce even though the taxpayer purchased the goods in contemplation of fulfilling an existing out of state construction job.

May Department Stores Co. v. Director of Revenue, 748 S.W.2d 174 (Mo. banc 1988). Taxpayer's customers in Missouri directed taxpayer to make delivery in another state, by

mail or by common carrier. The court held that when a contract of sale requires the seller to make delivery, title to the goods does not pass until delivery is made based upon the U.C.C., Section 400.2-401. When a customer makes a purchase at a store in Missouri and the seller agrees to effect delivery in another state, title does not pass in Missouri. Therefore, the sales transactions were not subject to Missouri sales tax.

Lynn v. Director of Revenue, 689 S.W.2d 45 (Mo. banc 1985). Taxpayer conducted boat excursions on the Missouri River. The vessel traversed into Kansas waters, but the passengers embarked and disembarked from Missouri, and all admission fees were collected in Missouri. The court held that the fees were subject to sales tax and were not exempt under section 144.030.1, RSMo, as in commerce.

Overland Steel, Inc. v. Director of Revenue, 647 S.W.2d 535 (Mo. banc 1983). Taxpayer was both a retailer and a contractor. Taxpayer purchased materials, which were ultimately installed, for Kansas customers. These materials were not resold by taxpayer but were consumed in its capacity as contractor. The sale of materials from the manufacturer to taxpayer was completed in Missouri and the sales were taxable. There was no evidence indicating transportation of the goods to Kansas was an integral part of the sale.

Western Trailer Service, Inc. v. LePage, 575 S.W.2d 173 (Mo. banc 1978). Taxpayer, located in Kansas City, Missouri, was engaged in the business of repairing and servicing commercial truck trailers. Taxpayer serviced trailers for a Kansas company where taxpayer went to Kansas, picked up the trailers and brought the trailers back to its business location in Kansas City. After the repairs were made and repair parts installed, the contract required taxpayer to return the trailers to its customer in Kansas. The court held that there was dealing between persons of different states in which importation was an essential feature or formed a component part of the transaction. Therefore, the retail sales were made in commerce between Missouri and Kansas, and the exemption in section 144.030.1, RSMo, applied.

American Bridge Co. v. Smith, 179 S.W.2d 12 (Mo. 1944). Missourians ordered goods from out-of-state vendors. The orders were accepted out-of-state and the goods shipped into Missouri from out-of-state, FOB Missouri. The court held that such transactions were exempt from Missouri sales tax

under section 144.030.1, RSMo, although not immune from the tax under the Federal Commerce Clause.

Metro Crown International, Inc. v. Director of Revenue (AHC 1990). Taxpayer made sales of aircraft tow tractor parts to airlines located outside Missouri operating as common carriers. The Commission concluded that the economic reality of the transaction was that the seller, the buyer and the place of the seller's taking possession of the goods were all in Missouri and that these were Missouri retail sales.

John Fabick Tractor Co. v. Director of Revenue (AHC 1996). When possession of leased equipment is transferred in Missouri, the lease is consummated at the place of business of the lessor. The monthly lease payments are subject to state and local sales tax regardless of whether the lessee subsequently moves the leased property to another taxing jurisdiction or even out of state.

12 CSR 10-113.300 Temporary Storage

PURPOSE: section 144.610, RSMo imposes use tax on the sale of tangible personal property that is purchased for use, storage or consumption in this state. Section 144.620, RSMo creates a presumption that tangible personal property sold for delivery in or transportation to Missouri is for use, storage or consumption in Missouri unless otherwise excluded. Sections 144.605(10) and (13), RSMo define the incidence of "storage" and "use." These sections provide an exclusion from use tax for property that is purchased for temporary storage in Missouri with the intent to subsequently use the property outside Missouri. This rule interprets this exclusion.

(1) In general, the temporary storage of property in this state with the intent to subsequently use the property outside the state is not subject to use tax.

(2) Definition of Terms.

(A) Storage—Any keeping or retention in this state of tangible personal property purchased from an out-of-state vendor, except property for sale or property that is temporarily kept or retained in this state for subsequent use outside the state. To be "for subsequent use outside the state" the purchaser must intend at the time the property is delivered to a Missouri location to subsequently use the property outside the state.

(B) Temporary—Generally, property kept or retained for less than a year may be considered temporary.

(C) Use—The exercise of any right or power over tangible personal property incident to the ownership or control of that property, except temporary storage of property in this state for subsequent use outside the state, or for sale of the property in the regular course of business.

(3) Basic Application of Exclusion.

(A) The purchase of tangible personal property from an out-of-state vendor that is temporarily kept or retained in this state for subsequent use outside the state is not subject to use tax. Any use of the property involving the exercise of any right, dominion, control or power over the tangible personal property, other than temporarily keeping or retaining the property in this state for subsequent use outside the state, constitutes a taxable use.

(B) Keeping or retaining tangible personal property in this state for longer than a temporary period subjects the purchase of the property to use tax, even if the property will be used subsequently outside the state.

(C) The purchaser need not designate at the time of purchase which specific property is for subsequent use outside the state, provided the purchaser can otherwise establish that some of the property is intended for subsequent use out-of-state. Intent can be shown by demonstrating the normal practices of the business or specific circumstances of the transaction. The commingling of property on which tax has already been paid with property on which tax has not already been paid, does not disqualify the property from the exclusion, but makes it difficult for the taxpayer to document which property was intended for use outside the state.

(D) The exclusion will not apply if any further processing, fabrication or other modifications are performed on or to the property while in this state.

(4) Examples.

(A) A Missouri contractor purchases from an out-of-state vendor materials and supplies for an out-of-state job. The items purchased are specifically ordered for the out-of-state job, are earmarked as such on the purchase orders and are delivered to the contractor temporarily in Missouri. No further processing, fabricating or other modifications are performed on the items. The materials and supplies purchased are not stock items that may be used in other ongoing jobs either within or without the state. The purchase of the materials and supplies would not be subject to use tax in Missouri.

(B) Same facts as in Example A, however the Missouri contractor performs fabrication labor on the materials in preparation for the out-of-state job at its location in Missouri. The purchase of the materials would then be subject to Missouri use tax.

(C) A Missouri law firm that has an office in Kansas orders ten computers from an out-of-state vendor for use in its Kansas office. The purchase orders are specifically earmarked accordingly. The computers will only be in Missouri for a few days in order to load the firm's network software. The purchase of the computers would be subject to Missouri use tax because loading the firm's software constitutes a taxable use.

(D) A taxpayer purchases equipment from an out-of-state vendor for storage in Missouri that it intends at the time of purchase to transfer the equipment to an out-of-state facility in eighteen months. The purchase is subject to use tax.

(E) Taxpayer is a wholesaler of goods. It purchased samples from an out-of-state vendor, which were delivered directly to its Missouri warehouse. The taxpayer at the time of purchase intended that twenty percent (20%) of the samples would go to its Missouri sales force and the other eighty percent (80%) would go to its out-of-state salespersons. All the samples were commingled and were only in Missouri for three (3) months. Because the wholesaler intended to send eighty percent (80%) of the samples out-of-state, the purchase of the eighty percent (80%) is exempt from use tax. However, the wholesaler should pay state and local use tax on any portion of the eighty percent (80%) used in Missouri at the time the samples are removed from the warehouse. Local use tax applies based on the location of the warehouse.

(F) A Missouri wholesaler purchases brochures from non-Missouri suppliers. The brochures are shipped to the wholesaler's warehouse in Missouri for later shipment to facilities both in-state and out-of-state. The wholesaler does not know at the time of purchase exactly when and where the brochures will be shipped. On average the brochures are stored for six (6) months. As brochures are needed for in-state and out-of-state customers, they are removed from storage and shipped to customers free of charge. Because the wholesaler intended to send some of the brochures out-of-state, the purchase is exempt from use tax. However, the wholesaler should pay state and local use tax on all items used in Missouri at the time the brochures are removed from the warehouse. Local use tax applies based on the location of the warehouse.

(G) Same facts as in Example F except all of the brochures are intended for use in Missouri. The wholesaler should pay tax on the entire purchase price at the time of purchase. Because the intent was for the brochures to be used in Missouri, any occasional out-of-state use does not qualify for the temporary storage exemption.

(H) Same facts as in Example F except some brochures are purchased from an in-state vendor and sales tax is paid at the time of purchase. The wholesaler commingles the taxed brochures purchased in state with the untaxed brochures purchased from out-of-state. Unless the wholesaler maintains specific documentation of which brochures will be used in-state and out-of-state the use tax is due on the commingling of the brochures.

AUTHORITY: section 144.705, RSMo 1994.
Original rule filed June 8, 2000, effective
Dec. 30, 2000.*

**Original authority: 144.705, RSMo 1959.*